

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SANDREL D. TIGNER-KEIR

v.

DEPARTMENT OF ENERGY

DOCKET NUMBER
SE07528110187

OPINION AND ORDER

Appellant has petitioned for review of an initial decision affirming the Department of Energy's (agency) action indefinitely suspending her from the position of Management Analyst. The action was based on alleged threats made by appellant to her supervisors.

In the initial decision, the presiding official found that the agency had proven the charges and that the penalty was not unreasonable. He also found that appellant had not proven her affirmative defenses of reprisal or discrimination and he sustained the agency action.

Appellant's petition for review merely repeats arguments made below and does not meet the criteria for Board review. 5 C.F.R. § 1201.115. Accordingly, appellant's petition is DENIED. Because of our finding of erroneous application of law as detailed below, however, we REOPEN the initial decision on our own motion pursuant to 5 U.S.C. § 7701(e)(1) and 5 C.F.R. § 1201.117.

In Martin v. Department of the Treasury, 10 MSPB 568 (1982), we held that pursuant to 5 U.S.C. § 7501(2) a "suspension" is "an action placing an employee in a temporary non-duty and non-pay status for disciplinary reasons or for other reasons pending inquiry." Id. at 571. The most

essential criterion of a suspension action is that it is temporary; in an indefinite suspension action, while the exact time duration may not be ascertainable, the action must have a specific condition subsequent which will terminate the suspension. An action imposed with no ascertainable end in sight is not sustainable as a suspension. Id. at 572. Further, indefinite suspensions are not based upon provable misconduct but upon the examination into that misconduct. Id. at 574 [citing Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976)].

In the instant case, the agency proposed appellant's indefinite suspension on December 17, 1980. As stated above, the action was primarily based on an alleged threat to appellant's supervisors. Further, the notice of proposed suspension cited a previous threat which resulted in appellant's placement in a paid leave status while under the care of a physician, and referred to appellant's health status and the lack of receipt of requested medical documentation to clarify appellant's condition. The notice of proposed indefinite suspension advised appellant that she would be placed in a ten-day non-duty pay status and afforded her seven days to respond.¹⁰ The agency's letter of decision was issued on January 15, 1981, and stated that

*/ 5 U.S.C. § 7513(b) provides:

An employee against whom an action is proposed is entitled to -

(1) at least 30 days' advance written notice unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action.

The crime exception was not invoked by the agency to justify shortening of the notice period. In view of our disposition of this case, however, we need not reach the issue of whether the shortened notice period constituted harmful error.

at appellant's request the reply date had been extended to January 12, 1981, that appellant's reply had been considered, and that the agency had determined that the indefinite suspension would be effected the day after appellant's receipt of the decision.

The decision letter further stated that "[d]iscussions with physicians indicate that the threats . . . may be the result of a recurrence of a recent illness during which you received psychiatric care" and informed appellant that she must submit to a medical examination and that failure to do so "may result in a notice of removal." On April 3, 1981, appellant was sent a letter from the agency, telling her that her indefinite suspension was to be continued. This letter also informed appellant that she could apply for disability retirement or benefits under the Federal Employees' Compensation Act, and offered assistance in the processing of any such claims.

While the agency termed the suspension as indefinite, no specific event or requirement which would terminate the suspension was set forth. Moreover, it does not appear that the action was taken for disciplinary or investigatory reasons; rather it appears to have been taken in an attempt to forego or delay removal of an employee with emotional problems. Thus, although the agency's action appears to have been well intended, it cannot be regarded as a suspension and cannot be sustained. While the agency might have been able to use enforced leave in this situation, it did not and we cannot affirm an agency action based upon what the agency might have done. Horne v. Merit Systems Protection Board, 684 F.2d 155 (D.C. Cir. 1982).

For the reasons set forth above, the initial decision is REVERSED and the indefinite suspension is NOT SUSTAINED. The agency is ORDERED to cancel appellant's indefinite suspension.

Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary within 20 days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Seattle Regional Office in accordance with 5 C.F.R. § 1201.181(a). This is a final Order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision, with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e-5(f)-(k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination

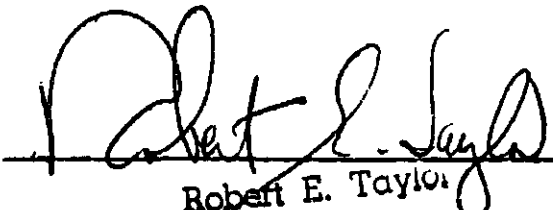
before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

MAY 11 1984

(Date)

Washington, D.C.



Robert E. Taylor
Secretary